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7                   UNITED STATES DISTRICT COURT  
8                   NORTHERN DISTRICT OF CALIFORNIA  
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12 VALENTI AGGIO, et al.,  
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14                   Plaintiffs,

No. C 04-4357 PJH

15                   v.  
16                   ESTATE OF JOSEPH AGGIO,  
17                   Defendant.

**ORDER GRANTING SEQUOIA  
INSURANCE COMPANY'S MOTION  
FOR SUMMARY JUDGMENT**

18                   The motion of Sequoia Insurance Company ("Sequoia") for summary judgment  
19 came on for hearing before this court on May 21, 2008. Plaintiffs appeared by David J.  
20 Lazerwitz and Dennis M. Cusack, and Sequoia appeared by John L. Kortum and Danielle  
21 A. Arteaga. Having read the parties' papers and carefully considered their arguments and  
22 the relevant legal authority, and good cause appearing, the court hereby GRANTS the  
23 motion.

24                   **BACKGROUND**

25                   This is a cost recovery action brought under the Comprehensive Environmental  
26 Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607, et seq., and  
27 the California Hazardous Substances Act ("HSAA"), Cal. Health & Safety Code §§ 25300,  
28 et seq., to recover response costs and other damages in connection with testing,

1 assessment, and clean-up of contamination on and in the vicinity of real property located  
2 on Stony Point Road in Cotati, California (“the Stony Point property” or “the property”).

3 Plaintiffs are Valenti Aggio, Dorothy L. Aggio, and Livio Aggio. Defendant is the  
4 Estate of Joseph Aggio, deceased (“the Estate”). From 1947 until the time of his death in  
5 1988, Joseph Aggio was the owner of the 156-acre Stony Point property. In 1981, Joseph  
6 Aggio purchased a Personal Catastrophe Liability policy from Sequoia, with a policy period  
7 extending from October 1, 1981 to May 30, 1982. He purchased a second policy for the  
8 period May 30, 1982 through May 30, 1985. The terms of the policies are identical, and  
9 they are referred to collectively herein as the “Sequoia policy.”

10 Probate opened for the Estate in 1988. By the terms of his will, Joseph Aggio’s  
11 community interest in the Stony Point property was devised to his sons Valenti Aggio,  
12 Sebastian (“Sam”) Aggio, and Livio Aggio. Probate, for which Sam Aggio was the  
13 administrator, closed in 1989. Also in 1989, Joseph Aggio’s widow died, and the three  
14 sons then inherited her half of the property. At some point in the 1990s, the property was  
15 sold to the Soilard Company, Inc. In 2001, Sam Aggio died, and his widow Dorothy Aggio  
16 acquired any interest he may have had in the property.

17 Between approximately 1958 and 1998, a 10-acre portion (“the Site”) of the Stony  
18 Point property was leased to the Cotati Rod & Gun Club (“CRGC”), at times pursuant to  
19 written lease agreements. CRGC paid an annual rent for the lease. Prior to the time of his  
20 death, Joseph Aggio also periodically leased portions of the property to his children for use  
21 as a dairy farm, to Marvin Soilard (“Soiland”) for use as a rock quarry, and to tenants living  
22 in a house on the property. He reported this rental income on his income tax returns.

23 During the lease period, CRGC operated three firing ranges and a trap shooting  
24 range on the Site. Plaintiffs assert that CRGC also allowed members of various state and  
25 federal law enforcement agencies to come onto the Site to use the shooting range. These  
26 activities caused lead bullets and other contaminants to be deposited in the soil.

27 In December 1995, CRGC entered into a Voluntary Cleanup Agreement (“1995  
28 VCA”) with the State of California, Environmental Protection Agency, Department of Toxic

1 Substances Control (“DTSC”) for the purpose of investigating and remediating lead  
2 contamination at the Site. The 1995 VCA stated that the Site was previously owned by the  
3 Aggio family, that CRGC had “had a series of 5 year leases,” that the property had been  
4 “sold to a new owner, Soiland Company, Inc.,” and that “[t]he new owner requires that the  
5 CRGC cleans up contamination from past activities . . . before the lease is renewed.” The  
6 1995 VCA contained a provision allowing either CRGC or DTSC to “terminate this  
7 Agreement for any reason” on 30 days’ notice.

8 CRGC retained an environmental consultant to develop a removal action plan. The  
9 consultant produced a report, and CRGC began remediation efforts in September 1998.  
10 After CRGC encountered financial difficulties and was unable to complete the work, DTSC  
11 terminated the 1995 VCA in August 1999.

12 In February 2003, plaintiffs entered into a VCA with the DTSC (“2003 VCA”). The  
13 2003 VCA indicated that the Site had formerly been owned by the Sebastian “Sam” Aggio  
14 Family Trust UTA, and was currently owned by the Marvin K. Soilard Family Trust UTA.  
15 As with the 1995 VCA, the purpose of the 2003 VCA was to enable investigation and  
16 remediation of the soil contamination at the Site, and the 2003 VCA also contained an  
17 identical provision allowing either side to terminate the agreement upon 30 days’ notice.

18 Plaintiffs retained an environmental consultant to assist in the investigation of the  
19 Site and preparation of a remediation plan. The consultant prepared a removal action  
20 report, which provided for remediation of the Site, but not for remediation of any off-Site  
21 areas. Plaintiffs claim that they cleaned up the CRGC Site in 2005, and spent over \$1.1  
22 million on the clean-up.

23 Plaintiffs filed the present action on October 14, 2004. On November 23, 2004,  
24 Sequoia filed an answer to the complaint, in its capacity as the liability insurer for the  
25 Estate. On June 1, 2005, plaintiffs filed the first amended complaint (“FAC”), alleging six  
26 causes of action – (1) a claim for cost recovery under CERCLA § 107(a); (2) recovery  
27 pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (“HSAA”),  
28 California Health and Safety Code § 25363(e); (3) public nuisance; (4) equitable indemnity;

1 (5) unjust enrichment; and (6) declaratory relief (seeking a judicial declaration that the  
2 Estate is liable for all past and future costs pursuant to CERCLA, the HSAA, and "other  
3 federal and state laws").

4 On October 3, 2005, Sequoia filed a third-party complaint against Soiland,  
5 individually and as trustee for the Soiland Trust; the Stony Point Rock Quarry, Inc.; and  
6 CRGC. The third-party complaint alleges claims for contribution pursuant to CERCLA, for  
7 contribution pursuant to HSAA, for equitable indemnity, and for declaratory relief.

8 On April 20, 2006, the DTSC issued a "Remedial Action Certification," which certified  
9 that "all appropriate response actions have been completed, that all acceptable engineering  
10 practices were implemented and that no further removal/remediation action is necessary."  
11 DTSC indicated that the contamination had not affected groundwater or surface water at  
12 the Site, and that the remedial action involved excavating and removing the top layer of  
13 soil, the greatest depth of excavation being 15 inches.

14 Sequoia now seeks summary judgment on the first amended complaint.

## DISCUSSION

### A. Legal Standard

17 Summary judgment is appropriate when there is no genuine issue as to material  
18 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.  
19 Material facts are those that might affect the outcome of the case. Anderson v. Liberty  
20 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there  
21 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

22 A party seeking summary judgment bears the initial burden of informing the court of  
23 the basis for its motion, and of identifying those portions of the pleadings and discovery  
24 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.  
25 v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof  
26 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other  
27 than for the moving party. Southern Calif. Gas. Co. v. City of Santa Ana, 336 F.3d 885,  
28 888 (9th Cir. 2003).

1       On an issue where the nonmoving party will bear the burden of proof at trial, the  
2 moving party can prevail merely by pointing out to the district court that there is an absence  
3 of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the  
4 moving party meets its initial burden, the opposing party must then set forth specific facts  
5 showing that there is some genuine issue for trial in order to defeat the motion. See Fed.  
6 R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

7       B.     Sequoia's Motion

8       Sequoia makes a number of arguments in support of its motion, asserting that it has  
9 no duty under the policy to indemnify the Estate; that plaintiffs cannot establish liability  
10 under CERCLA or the HSAA because the Site is not a "facility" under the statutory  
11 definition; and that plaintiffs cannot sustain either a cause of action for continuing public  
12 nuisance or a cause of action for unjust enrichment.

13      The court finds that summary judgment must be GRANTED on the ground that  
14 Sequoia has no duty to indemnify the Estate, both because the Estate has not incurred  
15 "damages" in a "suit," and because the policy's "owned property" and "business pursuit"  
16 exclusions bar coverage. In light of this determination, the court finds it unnecessary to  
17 address Sequoia's remaining arguments.

18       1.     Whether the Estate has incurred "damages" in a "suit"

19      Sequoia asserts that under California Probate Code § 554, plaintiffs can prove  
20 entitlement to indemnity only by demonstrating actual coverage under the Sequoia policy  
21 for the relief they seek. The policy's insuring agreement provides that Sequoia "agrees to  
22 indemnify the insured for the ultimate net loss in excess of the retained limit which the  
23 insured shall become legally obligated to pay as damages because of personal injury or  
24 property damage." The policy defines "ultimate net loss" as "[t]he total sum which the  
25 insured, or any company as his insurer . . . become[s] obligated to pay in settlement or  
26 satisfaction of losses for which the insured is liable either by adjudication or compromise  
27 with the written consent of the company . . . ."

28      Sequoia argues that it is not obligated to indemnify the Estate for its share of the

1 cost to remediate the soil contamination. Sequoia argues that the provision in the policy  
2 requiring indemnification for the “ultimate net loss” that the insured “becomes legally  
3 obligated to pay as damages” should properly be interpreted as triggering Sequoia’s  
4 indemnity obligation only if an ultimate net loss ripens into damages. Sequoia contends  
5 that a judgment against the Estate on the FAC will not result in an indemnifiable judgment  
6 because it will be neither the product of a “suit” nor an award of “damages.”

7 Sequoia contends that where, as here, the policy does not define “suit,” it is judicially  
8 defined as a civil action commenced by a complaint. Sequoia asserts that the underlying  
9 process that led to the remediation of the property, for which contribution is sought, does  
10 not satisfy this definition. Because the VCA was a voluntary agreement to remediate  
11 pollution, and damages cannot flow from such an agreement, but only from money ordered  
12 by a court in the context of a “suit,” Sequoia argues that plaintiffs cannot prove that the  
13 Estate will become legally obligated to pay damages – an essential element of plaintiffs’  
14 claim to the proceeds of the Sequoia policy.

15 Plaintiffs contend, however, that the present action is a “suit,” in which “damages”  
16 will be awarded; and argue that Sequoia’s duty to indemnify is therefore triggered.  
17 Plaintiffs claim that the 2003 VCA is relevant only as a cause of plaintiffs’ damages. They  
18 note that Joseph Aggio, the insured, did not enter into the VCA, and did not pay the costs  
19 of complying with the 2003 VCA or any other administrative order. Plaintiffs assert that  
20 they complied with the VCA, and that the costs they incurred now serve as a measure of  
21 the damages that they seek from Joseph Aggio in this suit. Thus, they contend, there is a  
22 “suit” that will result in court-ordered money damages. They contend that a finding that  
23 Joseph Aggio is responsible for the contamination on and from the CRGC Site will result in  
24 “damages” for which Joseph Aggio, and Sequoia in turn under California Probate Code  
25 § 550, are liable.

26 The court finds that Sequoia has no duty to indemnify the Estate under the facts  
27 presented here. As an initial matter, the court notes that an action to establish a  
28 decedent’s liability for which the decedent was protected by insurance “may be

1 commenced against the decedent's estate without the need to join as a party the  
 2 decedent's personal representative . . . ." Cal. Probate Code § 550(a). As a general rule,  
 3 however, damages sought against an estate are limited to insurance coverage unless the  
 4 estate's personal representative is joined as a party. Cal. Probate Code § 554 (judgment in  
 5 favor of plaintiff "is enforceable only from the insurance coverage and not against property  
 6 in the estate").

7 Because plaintiffs can recover only if there is coverage for the claimed relief under  
 8 the Sequoia policy, plaintiffs can prove entitlement to indemnity only by demonstrating  
 9 actual coverage under the policy for the relief they seek. However, the present action  
 10 seeking contribution to voluntarily-incurred environmental response costs is not a "suit"  
 11 seeking "damages."

12 Each of plaintiffs' causes of action against the Estate arises from the environmental  
 13 contamination of the Site, and the primary relief plaintiffs seek is the recovery of the costs  
 14 they incurred in remediating environmental contamination, pursuant to CERCLA  
 15 § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), and contribution under the HSAA, Cal. Health &  
 16 Safety Code § 25363(e). See FAC ¶¶ 22, 29. The purpose of a § 107(a) action is to seek  
 17 cost recovery (as distinct from contribution) by a private party that has itself incurred  
 18 cleanup costs. United States v. Atlantic Research Corp., 127 S.Ct. 2331, 2338 (2007).<sup>1</sup>  
 19 Under the HSAA, "[a]ny person who has incurred removal or remedial action costs in  
 20 accordance with [CERCLA § 107] may seek contribution or indemnity from any person who  
 21 is liable . . ." Cal. Health & Saf. Code § 25363(e).

22 This court must begin its coverage analysis by examining the way in which the  
 23 damages were incurred, not the way the damages are being claimed. See Vanderberg v.  
 24 Superior Court, 21 Cal. 4th 815, 838 (1999) (determinations of coverage must be made  
 25 individually by considering the nature of the property, the injury, and the risk that caused  
 26 the injury, in light of the provisions of the insurance policy).

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27  
 28 <sup>1</sup> The court declined to decide whether § 107(a) also contains an implied right to contribution. Id. at 2339 n.8.

1       Here, the loss that plaintiffs assert is the cost of soil remediation incurred pursuant to  
2 the 2003 VCA. The risk that caused that loss was CRGC's use of the Site as a shooting  
3 range, and, secondarily, Joseph Aggio's lease of the Site to CRGC. While the resulting soil  
4 contamination is "property damage" as that term is defined in the Sequoia policy, a  
5 judgment against the Estate compelling cost recovery or contribution to the cost of  
6 remediating that property damage will not result in "damages" awarded in a "suit" as  
7 required to trigger the duty to indemnify.

8       It is undisputed that the actions plaintiffs took under the 2003 VCA were voluntary,  
9 as the VCA contained an unconditional termination clause that permitted either side to  
10 terminate the agreement for any reason and at any time. In Foster-Gardner, Inc. v. Nat'l  
11 Union Fire Ins. Co., 18 Cal. 4th 857 (1998), the California Supreme Court held that the duty  
12 to defend does not extend to proceedings conducted before the DTSC, notwithstanding  
13 that such proceedings could ripen into a suit. Id. at 878-79.

14       Moreover, if Joseph Aggio had entered into the VCA with DTSC, and had then  
15 tendered the VCA to Sequoia for defense and indemnity, Sequoia would have had no  
16 obligation to indemnify Joseph Aggio, because the VCA was not a "suit" (a civil action  
17 commenced by a complaint). And because the VCA was not a "suit," the voluntarily-  
18 assumed costs of remediation incurred under the VCA cannot be "damages," because  
19 "damages" are used in an insurance policy to mean "money ordered by a court" – that is, "a  
20 money judgment entered against the insured in a third party suit for damages." Certain  
21 Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 960, 964 (2001)  
22 (Powerine I); see also CDM Investors & Travelers Cas. & Sur. Co., 139 Cal. App. 4th 1251,  
23 1259 (2006).

24       The duty to indemnify entails the payment of money, and can arise only after liability  
25 is established and damages are fixed in their amount. Powerine I, 24 Cal. 4th at 958. An  
26 action seeking recovery from Joseph Aggio of the voluntarily-assumed response costs  
27 incurred by plaintiffs does not transform those costs into "money ordered by a court." Thus,  
28 Sequoia has no duty under the policy to indemnify the Estate, and the fact that plaintiffs

1 have now filed the present “suit” is beside the point.

2       2. Whether plaintiffs’ action is barred by operation of policy exclusions

3           Sequoia contends that even if the court were to find that plaintiffs’ claims resulted in  
4 an award of “damages,” coverage for those damages would be precluded under the  
5 policy’s “owned property” and “business pursuit” exclusions.

6           Sequoia’s first argument is that any “damages” that might be awarded to plaintiffs  
7 are not covered under the Sequoia policy because the property damage from which the  
8 claims arise was property owned by Joseph Aggio. The policy provides that “[t]his policy  
9 shall not apply . . . (c) to damage to (1) property owned by the insured.” Sequoia asserts  
10 that this exclusion precludes plaintiffs’ recovery in this case.

11          The “owned property” exclusion precludes coverage for costs incurred to clean up  
12 one’s own property, even if such measures prevent future damage to the property of  
13 others. Titan Corp. v. Aetna Cas. & Surety Co., 22 Cal. App. 4th 457, 472-73 (1994). The  
14 “owned property” exclusion does not apply to damage to groundwater. See Intel Corp. v.  
15 Hartford Acc. & Indem. Co., 952 F.2d 1551, 1565-66 (9th Cir. 1991).

16          Here, the remediation costs for which plaintiffs seek indemnity are limited to the  
17 costs of remediating the soil contamination on the Site. Sequoia notes that the DTSC  
18 Remedial Action Certification makes it clear that the groundwater on the property was not  
19 contaminated by the presence of lead bullets – just the soil. Sequoia asserts that the fact  
20 that plaintiffs were able to enter into a voluntary VCA with the DTSC to clean up the  
21 contamination is indicative of the fact that the contamination was not an imminent threat to  
22 the surrounding environment. In addition, Sequoia asserts, these facts, combined with the  
23 fact that the remediation efforts were not undertaken pursuant to a court or administrative  
24 order, are sufficient to warrant application of the “owned property” exclusion.

25          Plaintiffs assert, however, that the “owned property” exclusion does not apply in the  
26 present case because they plaintiffs seek costs calculated to mitigate injury to human life  
27 and safety, as well as to third-party property. They claim that the clean-up measures were  
28 necessary to prevent contamination of third-party property through surface water and

1 sediment contamination, airborne dust, and groundwater contamination; and that the  
2 cleanup measures were also necessary to prevent human exposure to toxic lead. They  
3 contend that under California law, this exclusion does not apply to mitigation of damage to  
4 people, or to either mitigation of damage to third-party property, or to threat of future  
5 damage to third-party property, and that here, there are at a minimum triable issues of fact  
6 with regard to these questions.

7 Sequoia's second argument is that it is not obligated to indemnify plaintiffs because  
8 Joseph Aggio's lease of the Site to CRGC was a "business pursuit." The Sequoia policy  
9 precludes coverage of damages arising from "any business pursuits (other than farming) or  
10 business property (other than farms) of the insured." The policy defines "business" as  
11 "trade, profession, or occupation." Sequoia contends that the lease of the Site to CRGC  
12 constituted a "business pursuit" because CRGC paid an annual rent, and the fact that  
13 Joseph Aggio was motivated by a desire for profit is evidenced by the fact that he reported  
14 the income on his tax returns, and that he charged a late fee when the rent was late.

15 Plaintiffs contend, however, that Joseph Aggio was simply doing a favor for CRGC,  
16 and not running a business. Plaintiffs assert that he allowed the gun club on his property  
17 as a favor to his friends and as a community service. They contend that he was not  
18 motivated by profit, asserting that he received no rent from CRGC for the first ten years that  
19 CRGC used the property, and that he resisted raising the rent for CRGC, even though he  
20 was receiving less than market value and CRGC had indicated it could pay more in rent.

21 Plaintiffs deny that Joseph Aggio treated the income he received from CRGC as  
22 "business income," claiming that he did not depreciate the structures on this portion of the  
23 property on his federal or state income tax returns. Plaintiffs assert that the acceptance of  
24 nominal rent does not turn a "favor" into a "business." They claim that Joseph Aggio did  
25 none of the things a landlord would normally do, such as maintenance, and never  
26 negotiated a lease with CRGC. In addition, they claim that the treasurer of CRGC does not  
27 recall ever paying a late fee.

28 The court finds that plaintiffs have not created a genuine issue of material fact with

1 regard to the application of either the “owned property” exclusion or the “business pursuits”  
2 exclusion. In determining whether a duty to indemnify exists, proof of actual or  
3 substantially-threatened – not merely potential – third-party property damage caused by  
4 owned property damage is necessary to defeat the “owned property” exclusion. See Titan,  
5 22 Cal App. 4th at 471-72.

6 Here, the Preliminary Endangerment Assessment prepared by the DTSC in May  
7 1996, and the work plan prepared by the CRGC’s environmental consultant in September  
8 1998, found no contamination of groundwater and no environmental risk from airborne  
9 release of pollutants. In April 2006, the DTSC certified that “no further removal/remediation  
10 action is necessary.”

11 Plaintiffs claim, based on a declaration submitted by Gregory Murphy, the project  
12 manager hired by plaintiffs in 2004 in connection with the investigation and remediation of  
13 the hazardous waste at the Site, that the remediation of the Site was necessary to prevent  
14 a risk posed to human health and the environment both within the area of the Site, and in  
15 areas adjacent to and downstream or downhill from the Site. However, plaintiffs have  
16 presented no evidence showing any substantially-threatened damage at present, and no  
17 evidence to counteract the DTSC’s certification that no further action is necessary.

18 Nor have plaintiffs raised a genuine issue of material fact regarding the application of  
19 the “business pursuits” exclusion. The typical business pursuits exclusion turns on a profit  
20 motive. See Uhrich v. State Farm Fire & Cas. Co., 109 Cal. App. 4th 598, 618 (2003); see  
21 also State Farm Fire & Cas. Co. v. Drasin, 152 Cal. App. 3d 864, 870 (1984) (defining  
22 “business pursuit” as “regular activity engaged in for the purpose of earning a profit . . .  
23 includ[ing] part-time or supplemental income projects”).

24 Here, plaintiffs concede that Joseph Aggio leased the Site to CRGC over a period of  
25 many years, beginning in the 1960s and continuing until his death in 1988, and received  
26 income that he claimed on his income tax returns. Indeed, the evidence shows that  
27 between 1972 and 1988, Joseph Aggio’s primary income came from rents, and that his  
28 rental income included the rent from the CRGC Site, the ranch, the rock quarry, and a

1 house. The failure to depreciate is irrelevant, as there is no evidence that there was in fact  
2 anything to depreciate.

3 **CONCLUSION**

4 In accordance with the foregoing, the court finds that Sequoia's motion for summary  
5 judgment must be GRANTED.

6 No later than July 3, 2008, the parties shall submit a joint written statement  
7 specifying what claims remain in the case in light of the present decision on Sequoia's  
8 motion for summary judgment. The court is also willing to entertain a request by Sequoia  
9 for partial judgment pursuant to Federal Rule of Civil Procedure 54.

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11 **IT IS SO ORDERED.**

12 Dated: June 19, 2008



13 PHYLIS J. HAMILTON  
14 United States District Judge  
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